

REMARKS

Applicants have reviewed and considered the Non-Final Office Action mailed on August 19, 2009. Claims 1, 5-10, and 21-30 are pending in the present application, and all claims currently stand rejected. Applicants amend Claims 1, 5-8, 10, 24, 25, and 27 to expedite prosecution of this Application. Support for the amendment may be found in the original disclosure at least on page 8, paragraph [0024]. No new matter is being introduced by way of the amendments. Applicants respectfully request reconsideration and allowance of the claims in view of the following remarks.

Objection to the Specification

The specification is objected to as failing to provide proper antecedent basis for the claimed subject matter. To expedite prosecution of this application, Applicants amend Claims 1 and 27 to delete the objected to phrase. Accordingly, the objection to specification should be withdrawn.

Claim Rejections – 35 U.S.C. § 112 – 2nd paragraph

Claims 1, 5, and 21-30 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Applicants amend Claims 1 and 27 to delete the rejected to phrase. Therefore, Applicants respectfully request the rejection under 35 U.S.C. § 112, 2nd paragraph, be withdrawn.

Claim Rejections – 35 U.S.C. § 103

Claims 1, 5, 6, 10, 21, and 22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Johnson (WO 00/59424 A1) in view of Overton et al (U.S. Patent No. 5,611,846). Claims 7, 23, 24, 27, and 28 are rejected under 35 U.S.C. 103(a) as being unpatentable over Johnson ('424) in view of Overton et al (,846) and in further view of Scherson et al. ('570). Claims 8 and 25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Johnson ('424) in view of Overton et al ('846) and further in view of Fleischmann (U.S. Patent No. 6,398,767). Claims 9 and 26 are rejected under 35

U.S.C. 103(a) as being unpatentable over Johnson ('424) in view of Overton et al (,846) and further in view of Parker et al (U.S. Patent No. 4,955,391). Applicants respectfully traverse the rejections.

The Examiner bears the burden of establishing a *prima facie* case of obviousness based on the prior art when rejecting claims under 35 U.S.C. §103. *In re Fritch*, 972 F.2d 1260, 23 U.S.P.Q.2d 1780 (Fed. Cir. 1992). When evaluating claims for obviousness under 35 U.S.C. 103, all the limitations of the claims must be considered and given weight. *Ex parte Grasselli*, 231 USPQ 393 (Bd. App. 1983) aff'd mem. 738 F.2d 453 (Fed. Cir. 1984). In other words, all words in a claim must be considered in judging the patentability of that claim against the prior art. MPEP § 2143.03. Further, rejections based on obviousness cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness. *Teleflex Inc. v. KSR Int'l Co.*, 550 U.S. at 1, 82 USPQ2d at 1396 (2007) (emphasis added).

The Office Action Substantively Errs By Improperly Using Hindsight To Combine References

The Office Action fails to establish a *prima facie* case of obviousness under 35 U.S.C. § 103 because the Office Action improperly uses hindsight as a reason for combining the cited references. For instance, the Office Action's use of hindsight is apparent in the following statement "Overton discloses a gas chromatograph (GC) that is a chromatograph disclosed by applicant for use with the claimed device." Office Action, page 4, lines 4-5 (emphasis added). As stated in the MPEP, a rejection based on obviousness may not be supported by "knowledge gleaned only from applicant's disclosure." See MPEP § 2145.X.A. Accordingly, for at least this reason, the Office Action fails to establish a *prima facie* case of obviousness under 35 U.S.C. § 103 for Claims 1, 5, 6, 10, 21, and 22.

The Office Action Fails To Provide Articulated Reasoning With Some Rational Underpinning To Support The Legal Conclusion Of Obviousness.

The Office Action fails to establish a *prima facie* case of obviousness under 35 U.S.C. § 103 because the Office Action fails to provide articulated reasoning with some rational underpinning to support the legal conclusion of obviousness as required under KSR. Instead, the Office Action merely relies upon a conclusory statement that “it would be obvious to one of ordinary skill in the art to modify the device of Johnson so as to comprise a gas chromatograph, computer processing unit and software program as disclosed by Overton to allow identification of analytes in unfiltered wound fluid to determine the physiological status of the wound bed environment for diagnostic purposes.” Again, the Office Action appears to merely rely on Applicants claimed invention and disclosure as support for obviousness without articulating any additional reasons as to why it would have been obvious to one of ordinary skill in the art at the time of the claimed invention to combine the cited references. In particular, Johnson does not appear to disclose or even suggest the use of a gas chromatograph for identifying an infection based on fluids removed from a wound. Instead, Johnson appears to disclose the use of growth factors for accelerating wound healing. In addition, Overton is devoid of any disclosure that suggests the use of a gas chromatograph for identifying an infection based on fluids removed from a wound. Accordingly, one of ordinary skill in the art would not have been motivated to combine the teachings of Overton with that of Johnson at the time of the claimed invention based on the disclosure of the cited references. Consequently, for at least this additional reason, the Office Action fails to establish a *prima facie* case of obviousness under 35 U.S.C. § 103 for Claims 1, 5, 6, 10, 21, and 22.

The rejections to Claims 7-9 and 23-28 under 35 U.S.C. 103 also rely on the combination of Johnson and Overton. Accordingly, for at least the above stated reasons, the Office Action also fails to establish a *prima facie* case of obviousness under 35 U.S.C. § 103 for Claims 7-9 and 23-28.

CONCLUSION


Applicants respectfully submit that the pending claims are in condition for full allowance and the same is respectfully requested.

To provide for the possibility that Applicants have overlooked the need for a fee, including a fee for an extension of time under 37 C.F.R. 1.136(a), the Commissioner is hereby authorized to charge any underpayment of fees or credit any overpayment to Deposit Account No. 19-3140 of Sonnenschein Nath & Rosenthal LLP.

The Examiner is invited to call the undersigned at the below-listed telephone number if, in the opinion of the Examiner, such a telephone conference would expedite or aid the prosecution and examination of this application.

Date: 11/19/09

Respectfully submitted,



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